Supreme Court, U.S.
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No._____

In the Supreme Court
of the United States

October Term, 1999

WARD OCKENDEN, JENNIE OCKENDEN,
Petitioners,
v.
JOSEPHINE COUNTY, a political subdivision of the State of Oregon, LAND CONSERVATION AND DEVELOPMENT COMMISSION OREGON,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI By WARD OCKENDEN AND JENNIE OCKENDEN TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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79 pp

QUESTION PRESENTED FOR REVIEW

On the motion of an intervenor who lacks standing to raise issues of liability, may a United States Court of Appeals set aside a long unchallenged stipulation of liability under the guise of Fed. R. Civ. P. 60(b)?

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By WARD OCKENDEN AND JENNIE OCKENDEN
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Petitioners Ward Ockenden and Jennie Ockenden (the "Ockendens" or "Petitioners") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, so the Ockendens may obtain relief from Josephine County,

Oregon's admitted violation of their constitutional rights.

CITATIONS TO REPORTS BELOW

The Magistrate's Order of December 24, 1997, has not been reported officially or unofficially. The Ninth Circuit Memorandum decision of May 20, 1999, has not been reported officially, but has been reported unofficially as *Ockenden v. Josephine County*, No. 98-35104, 1999 WL 362899 (9th Cir. May 20, 1999). Petitioners append the Order as Appendix A and the Memorandum decision as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was filed on May 20, 1999. The Ninth Circuit issued its Mandate on June 14, 1999. This Court possesses jurisdiction pursuant to 28 U.S.C. sec. 1254(1). This Petition is filed within ninety days of the date of entry of judgment, in compliance with Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition implicates Amendment XIV, Section 1, Constitution of the United States of America:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

> law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Petition also implicates Article III, Section 2 of the Constitution of the United States of America:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; between a State and Citizens of another State;--between Citizens of different States--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This Petition also involves 28 U.S.C. sec. 1292(a) (Appendix C), pertaining to the jurisdiction of the Ninth

Circuit, and Fed. R. Civ. P. 60(b) (Appendix D), under which the Magistrate and the Ninth Circuit purported to act.

STATEMENT OF THE CASE

Petitioners Ward Ockenden and Jennie Ockenden, husband and wife, the Plaintiffs/Appellants below ("Ockendens" or "Petitioners") own real property in Josephine County in rural Southern Oregon. They sued Josephine County ("County") in the United States District Court for the District of Oregon ("District Court"), alleging violations of their civil rights to substantive due process and equal protection of the laws (R. 6-13)[1]. District Court jurisdiction rested upon 42 U.S.C. sec. 1983 and 28 U.S.C. sec. 1343.

The Ockendens alleged that the County had acted arbitrarily, capriciously, and unreasonably in refusing to change the land use designation on part of their real property since the County had granted such relief to other citizens similarly situated. **The County admitted violating the Ockendens' civil rights and thereby causing them substantial damages.** On April 4, 1997, the County, acting by Order of its Board of County

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[1] "R." signals record citations to the Petitioner's Excerpts of Record filed in the Ninth Circuit.

Commissioners, following a public hearing[2] duly noticed under applicable law (R. 23, County Supp. R. 7[3]) and on the advice of County Counsel who had been negotiating with Petitioners' lawyer for many months (R. 131-32, 170, 197-98), executed a formal written Stipulation (Appendix E) which admitted that all of the material facts alleged by the Ockendens in their Complaint were substantially true and correct (R. 14-15), and specifically acknowledged that the County had violated Petitioners' civil rights (R. 14-16, 137).

As a remedy for this stipulated violation, the County consented to entry of a final consent decree permanently enjoining it to provide the land use designation and zone change the Ockendens had sought for five years (R. 18-19). On April 7, 1997, the District Court entered this stipulated Consent Decree[4] (R. 18-20).

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[2] Neither the Ockendens nor their attorney attended the public hearing (R. 138, 192-93). The report of that hearing does not record any appearance by, or opposition from, the State of Oregon or any State representative (R. 233-36).

[3] "County Supp. R." refers to the Supplemental Excerpt of Record of Appellee Josephine County filed with the Ninth Circuit.

[4] The District Court Order was signed by the Honorable John P. Cooney, United States Magistrate ("Magistrate"), acting by written consent of the parties to a magistrate judge. 28 U.S.C. § 636.

No one has appealed this Decree, and the time for appeal has long ago lapsed.

Josephine County refused to comply with the Consent Decree. The Ockendens filed civil contempt proceedings on June 3, 1997 (R. 21-36), and the District Court issued two Orders to the County to Show Cause (R. 37-46).

Ninety days after entry of judgment, and armed with different lawyers, Josephine County moved for relief from the Consent Decree, citing Fed. R. Civ. P. 60(b) (1), (4), (5), and (6) (R. 50-60). **The County did not repudiate its stipulation as to liability, *i.e.* its admission that it had violated Petitioners' civil rights and thereby caused them damage; all County contentions dealt with the propriety of the remedy**[5]. **Josephine County's new lawyer judicially admitted that the Ockendens made no misrepresentations to the District Court during the stipulation process** (R. 185).

On July 7, 1997, the State of Oregon ("State") moved to intervene in this archived case (R. 47-49). The Magistrate allowed intervention (R. 66-88), specifically

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[5] Josephine County claimed that the remedy it had agreed to and that was provided in the Consent Decree constituted an impermissible land use decision (R. 53-54). Prior to the appeal in this case, Petitioners filed an Amended Complaint pleading a claim for money damages as an alternative remedy. Clerk's Record, docket number 52; Appendix E, App-44 to App-47.

assuming the accuracy of all facts favorable to the State (R. 68, n.1). The Magistrate held that the State's protectable interest was the judgment it obtained in a prior state court land use case, *Doob v. Josephine County*, 27 Or. LUBA 293 (1994) ("*Doob*") (R. 86).

On September 11, 1997, the State moved to vacate the Consent Decree under Fed. R. Civ. P. 60(b) (3), (4), and (6) (R. 89-91). **Like Josephine County, the State did not challenge the County's concession that it had violated the Ockendens' civil rights; its only possible interest and argument related to the remedy contained in the Consent Decree, which it contended violated State land use laws.**

On December 24, 1997, the Magistrate entered an Order granting the State's motion on the basis of Fed. R. Civ. P. 60(b)(3) (R. 139-56), deciding that - despite the County lawyer's concession that the Ockendens had not misrepresented anything (R. 185) - Josephine County and Petitioners had "misrepresented" (1) that before July, 1995, Petitioners' request for a plan map amendment and a zone change had been "ultimately denied", and (2) that after July, 1995, Josephine County "failed and refused" to grant Petitioners request for a plan map amendment and zone change (R. 153-55)[6]. The Magistrate decided

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[6] The Magistrate was dead wrong factually. The County had stipulated that the allegations of Petitioners' Complaint were true and correct (R. 15), and it occupied the best position to characterize its own actions. Further, the record contains **no evidence, let**

that Josephine County's motion for relief was "moot" (R. 156).

In reaching this result, the Magistrate misread *Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir. 1982)[7] and specifically premised his decision upon a "preponderance of the evidence" standard instead of the correct "clear and convincing evidence" requirement (R.

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alone clear and convincing evidence, that Josephine County approved the Ockendens' applications for a plan map amendment and a zone change after remand from the Land Use Board of Appeals and before or after July 1995; therefore, the applications were "ultimately denied." While there may be a factual dispute as to the obligation to reschedule a post-July 1995 hearing, the record contains **no evidence** that Josephine County approved Petitioners' applications after July 1995. As some of the Stipulation authorities recognize (*see* R. 16, 26), the law does not require a futile act by landowners in this context (R. 166). *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989). The State later urged on appeal that Petitioners "misled" the court by not naming the State and Steve Doob as parties to their civil rights case (State Brief 11, 13). Petitioners possessed no civil rights claim against these persons. Most likely, had such claims been filed, the State would have sought sanctions against the pleader for filing a baseless claim.

[7] *See also, Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339, *reh'g denied*, 578 F.2d 871 (5th Cir. 1978), *and LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986).

155)[8]. Application of the wrong legal standard of decision constitutes a clear error of law. *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996) *cert. denied*, ___ U.S. ___, 118 S.Ct. 44, 139 L.Ed.2d 11 (1997). The "clear and convincing" standard meaningfully differs from the conventional "preponderance of the evidence" measure and represents ". . . a means of protecting society from the consequences of grave decisions too lightly reached." *Eastwood v. National Inquirer, Inc.*, 123 F.3d 1249, 1252 n.5 (9th Cir. 1997).

The Magistrate also overlooked the fact that, **given the County's stipulation, Petitioners had not and could not present any "evidence" supporting the allegations in their Complaint upon which the**

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[8] In reaching his result, the Magistrate also discarded the extensive affidavit of Richard Riker, filed by Petitioners. Mr. Riker, a long time employee of the Josephine County Planning staff, provided extensive testimony in support of Petitioners' claims of Constitutional civil rights violations (Supp. R. 211-36). The Magistrate decided that the affidavit was "not based on personal knowledge and it consist [sic] largely of opinions on matters of law." (R. 141). While Mr. Riker's affidavit may have lacked the customary "magic words," even a cursory review demonstrates that he describes himself, his background, the meetings he attended, the events he observed, and the conversations in which he participated. These obviously are matters of personal knowledge, not "opinions on matters of law." ["Supp. R." refers to Appellants' Further Excerpts of Record filed with the Ninth Circuit].

Stipulation rested.[9] Moreover, the Magistrate did not engage in any fact-finding process; instead, he relied upon the "facts" he had assumed to be true in granting the State's motion to intervene (R. 68, n.1; R. 150, n.7; *compare* R. 68-75 with R. 141-48).[10]

Since this December 24, 1997, Order constituted an interlocutory order of a District Court dissolving a permanent injunction, the Ockendens timely appealed that Order to the Ninth Circuit pursuant to 28 U.S.C. sec. 1292(a) (R. 1-5). **For the first time, during the appellate briefing process, the County and the State urged that the Order had tampered with the issue of responsibility, in addition to the question of remedy**. The County (*e.g.*, County Brief 12, 15 n.8, 18-22, 29, 31, 36, 40, 42-43) and the State (*e.g.*, State Brief 9, 17, 26, 28-29, 35) suddenly argued that the long-archived County stipulation and admission that it had violated Petitioners civil rights and thereby caused them

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[9] The Magistrate apparently did not understand that the Stipulation was the product of extended negotiations between the attorneys for the County and Petitioners, during which time Petitioners' counsel disclosed substantial evidence supporting both the liability and damages features of his case (R. 131-32, 170, 197-98). The court also overlooked the fact that one does not ordinarily plead evidence in a complaint under standard Federal practice, and that to do so invites sanctions at the trial level in this District.

[10] The Magistrate held no evidentiary hearing in this proceeding.

significant harm had been set aside and remained an open question. Petitioners' Reply Brief (*e.g.*, Reply Brief 2, 9, n.7, 13, 18, n.13, 19, 21, 26-28) challenged this unanticipated and unmerited position.

In response to the new arguments of the County and State attempting to revoke the County's prior stipulation of liability, Petitioners asserted that the State had no interest whatsoever in the liability portion of the case, and that the State's only significantly protectable interest was in the remedy. Appellate counsel for the Ockendens devoted a substantial portion of his oral argument to the Ninth Circuit on this essential differentiation of responsibility from remedy, as the audio recordings of that argument demonstrate.

The Ninth Circuit affirmed the Magistrate. It found the Magistrate's clear legal error in applying the incorrect standard to be "harmless" (Appendix B, App-23). However, unlike the Magistrate, it found as a fact that the lower court had entered the consent decree "under a misapprehension induced by fraud" (*Id.*, App-24)[11]. In affirming the Magistrate's order, the Ninth

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[11] The Magistrate did not actually engage in any fact-finding. Rather, the Magistrate assumed the validity of the State's factual statement as it had on the State's earlier motion to intervene (R. 68, n.1, R. 150, n.7; Ockenden Ninth Circuit Brief, 12-13). Federal Circuit Courts of Appeal seldom if ever engage in fact-finding. Petitioners argued that the Ninth Circuit should not do so in this case, *e.g.*, Reply Brief 5. Petitioners can comprehend no basis for appellate fact-finding in this instance.

Circuit upheld the **State's, not the County's**, motion to set aside the judgment pursuant to Fed. R. Civ. P. 60(b). The Ninth Circuit did not address the County's motion, and presumably concurred with the Magistrate that it was moot.

The Ninth Circuit's failure to differentiate between the issues of responsibility and remedy effectively erased - on the motion of the State - the County's Stipulation that it violated the Ockendens' civil rights.

ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT

This is a case about a remedy. It is not a case about responsibility. The Ninth Circuit's decision effectively revoking the County's stipulation of liability on the motion of the State, which does not have standing to address issues of liability, is such a radical departure from the ordinary, accepted and usual course of judicial proceedings as to call into action the exercise of this Court's supervisory powers. Sup. Ct. R. 10(a).

I. THE NINTH CIRCUIT SHOULD NOT HAVE SET ASIDE A LONG UNCHALLENGED STIPULATION OF LIABILITY ON THE MOTION OF AN INTERVENOR WHO LACKS STANDING TO RAISE LIABILITY ISSUES.

The Ninth Circuit affirmed the dissolution of the consent decree, and the County's stipulation of liability, on the motion of the State. This was improper because the State lacks standing to raise, and possesses no

significant protectable interest in the determination of liability in this case.

The actions of an intervenor, such as the State, should be limited to issues on which the intervenor has standing, and issues which relate to the intervenor's significant protectable interest. This rule arises from the confluence of two separate lines of authority. First, an intervenor must have standing to intervene. *United States v. AVX Corp.*, 962 F.2d 108, 111-12 (1st Cir. 1992); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), *cert. denied*, 476 U.S. 1008, 106 S.Ct. 1956, 90 L.Ed.2d 364 (1986); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991); *Didrickson v. United States Dep't of Interior*, 982 F.2d 1332, 1337 (9th Cir. 1992); *Howard v. McLucas*, 782 F.2d 956, 958-59 (11th Cir. 1986); *Building & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir 1994).[12] Second, an intervenor may only participate in a case to the extent of its significant protectable interest.

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[12] This Court has previously recognized that standing is essential to maintenance of a claim in federal court. The Constitution confines federal courts jurisdiction to "Cases" or "Controversies." U.S. Const., Art. III, § 2; *Diamond v. Charles*, 476 U.S. 54, 61-62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48, 57 (1986). "Standing to sue or defend is an aspect of the case or controversy requirement." *Id.*; *Arizonans for Official English v. Arizona*, 520 U.S. ___, 117 S.Ct. 1055, 1067, 137 L.Ed.2d 170, 191 (1997).

Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984); *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1116, 1124-25 (3d Cir. 1992); *Harris v. Pernsley*, 820 F.2d 592, 599 (3d Cir. 1987), *cert. denied*, 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); *Thomas v. Bakery, Confectionery & Tobacco Workers Int'l Union, Local #433*, 982 F.2d 1215, 1220 (8th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2961, 125 L.Ed.2d 661 (1993); *Donnelly v. Glickman*, 159 F.2d 405, 409-10 (9th Cir. 1998); *Howard*, *supra*.

The State possesses no standing to raise issues of liability in this case; it has standing only to address issues of remedy. Petitioners have never claimed that the State was liable for violation of their Constitutional civil rights. The Ockendens have asserted no 42 U.S.C. sec. 1982 claim against the State. They know of no basis upon which the State - or any person other than the County - could assert an interest in the issue of liability. At the very most, the State could aver an interest in the remedy to the extent that it allegedly violated state land use laws[13]. This was the sole interest asserted until the

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[13] The Federal Supremacy Clause would seem to settle this separate issue of the appropriate remedy as well. U.S. Const., Art. IV, sec. 2; *Ex Parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed 714, 729 (1908); *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983) (Supremacy Clause requires a remedy for a

State's appellate lawyer filed her Ninth Circuit brief.

Although the Magistrate made the conclusory finding that the State did have standing to intervene (R. 86), the Magistrate did not distinguish between standing to appear regarding liability and standing to appear regarding remedy. At the time the Magistrate granted the State's motion to intervene, no need existed for the Magistrate to so differentiate, because no party had expressed an interest in setting aside the County's stipulation of liability (this argument was not raised until appeal). Because liability was established and only remedy was at issue, the Magistrate's finding of standing should be limited to a determination that the State had standing only with respect to remedy. Where a lower

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state violation of Federal constitutional rights). State law certainly cannot divest Federal courts of jurisdiction concerning original actions under 42 U.S.C. sec. 1983. The sole legitimate issue that the State could place before the court would have to relate to the remedy: that the proposed remedy would intrude unnecessarily upon the State's rights and that a less intrusive remedy would be sufficient to remedy the violation of the plaintiff's constitutional rights. *Washington*, 700 F.2d at 574 (suggesting the court in such a case ought to select the remedy which intrudes the least upon the rights of the state). In the present case, the County already selected the least intrusive remedy in its view when it stipulated to injunctive relief and it should be bound by that deliberate litigation choice. Since any remedy intrudes to some degree upon the interests of the State, the only remaining question here would be selection of the least intrusive remedy *vis-a-vis* Petitioners and the State. This record contains neither evidence upon, nor decision about, this question, leaving the State in an unenviable position.

court order can be read narrowly to be correct, but broadly read would be incorrect, this court should read the order narrowly. *Interpretatio fienda est ut res magis valeat quam pereat.*

The State cannot derive standing for itself from the mere fact that another party, the County, might have standing to raise an issue. *See*, *Arizonans for Official English*, 520 U.S. at ___, 117 S.Ct. at 1067, 137 L.Ed.2d at 191-92; *Diamond*, 476 U.S. at 68-69, 106 S.Ct. at 1706-07, 90 L.Ed.2d at 61-62. Once the County stipulated on the issue of liability, no case or controversy existed regarding liability on which the State could "piggyback." *AVX*, 962 F.2d at 112.

The State also does not have a significant protectable interest in the liability issues in this case. A proposed intervenor must have a "significantly protectable interest" before intervention is appropriate under Fed. R. Civ. P. 24(a)(2). *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580, 589 (1971). The Magistrate found that the State's significantly protectable interest in this case was the *Doob* decision. *Doob* involved only the state land use process, not 42 U.S.C. sec. 1983. Oregon's Land Use Board of Appeals ("LUBA") did not and could not determine liability under 42 U.S.C. sec. 1983.[14]

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[14] LUBA is a court of limited jurisdiction. LUBA's jurisdiction is defined in ORS 197.825, and "is limited to those

II. THE NINTH CIRCUIT SHOULD NOT HAVE REVOKED THE STIPULATION OF LIABILITY FOR ANY REASON.

Responsibility or liability has long been settled. Josephine County admitted and stipulated that it violated the Ockendens' Constitutional civil rights to substantive due process and equal protection of the laws, and that its violations caused significant harm to the Ockendens. It is too late now to change that position. Indeed, until the State and County filed their briefs in the Ninth Circuit, no one had even suggested that anything but the propriety of the remedy comprised an issue in this case.

The County, the State, and the lower courts failed to comprehend the meaning and essence of a Stipulation. A stipulation concedes facts and issues. It forever forecloses **any party** from introducing **any evidence** supporting or contradicting the stipulation. *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (in federal court, stipulations bind the parties

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cases in which the petitioner has exhausted all remedies available by right before petitioning the [LUBA] board for review." ORS 197.825(2)(a). The Ockendens were required to pursue their constitutional claims in federal court (or in a state court with concurrent general jurisdiction) prior to raising their claims before LUBA. Furthermore, ORS 197.835(9)(a)(E) does not grant LUBA jurisdiction to hear an original action for violation of constitutional rights under 42 U.S.C. section 1983. This subsection only allows LUBA to "reverse or remand" a land use decision under review if it finds the decision was unconstitutional.

and the courts); *Schlemmer v. Provident Life & Acc. Ins. Co.*, 349 F.2d 682, 684 (9th Cir. 1965) (the court's obligation is to "treat stipulated facts as having been established by clearest proof"); *Ferguson v. Neighborhood Housing Servs. of Cleveland, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986) (formal admissions effectively withdraw a fact from controversy and dispense wholly with the need for proof); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976) (stipulations as to material facts are deemed to be conclusively established). It ends the stipulated issues. As the Fifth Circuit so aptly put it in *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1151 (5th Cir. 1975):

> . . . . Although the court must approve a consent decree, in doing so it does not inquire into the precise legal rights of the respective parties . . . but only assures itself that there has been valid consent by the concerned parties and that the terms of the decree are not unlawful, unreasonable, or inequitable. . . .[15]

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[15] Two salient policy reasons undergird the established rule concerning stipulations. First, the use of stipulated facts, issues, and conclusions enhances judicial economy. Stipulations remove facts and issues which can be readily resolved and thereby reduce the use of valuable judicial resources. Second, stipulations accord with the public policy favoring private decision-making or

At least in this District, a party or attorney attempting to introduce evidence regarding a stipulated fact or issue would run a significant risk of sanctions.

Ignoring the established essence of a Stipulation, the County and State encouraged the lower courts to look behind the Stipulation and to criticize the parties to the Stipulation for not incorporating the evidence underlying it. Thus, although the lawyers for the County and Petitioners disclosed and discussed evidence concerning their respective positions on responsibility (and even exchanged damage valuations and computations) (R. 131-32, 170, 197-98) before entering into the Stipulation, the lower courts found the admitted and conceded document "misleading" or "fraudulent" for not containing all that welter of underlying evidence. This untoward result undermines the reasons for, and usefulness of, a stipulation. It erodes the concept of compromise and it wastes scarce judicial time. It allows a court to destroy a solemn concession of liability without a joinder of issues, without standing, without a trial, and without any recognized jurisdictional basis. It also aids and abets a government that decides to go back on its word, even when a common cabinet-maker and his wife rely to their detriment on that agreement. And, it penalizes litigants

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compromise, the theory that the best resolution to a dispute arises from the parties themselves. *See*, Wigmore on Evidence, sec. 2588 (James H. Chadbourn Rev. 1981).

like the Ockendens for not doing that which, by custom, law and practice, they cannot do.

The lower courts compounded their misconceptions and errors by peeking behind the stipulation with one eye closed. While they thought that they saw misleading omissions, in fact they saw only what the County and State wanted them to see, a one-sided, hindsight-only view of the claim. Because the Ockendens relied upon the Stipulation, and could not introduce the evidence supporting it, the record contained virtually none of their evidence of Constitutional civil rights violations and resulting damages[16] which had been disclosed to the County and supported its decision to stipulate. Given the fact that the record could not, and did not, contain the plethora of evidence supporting the Ockendens' claim and the County's Stipulation, the findings of "clear and convincing" evidence of "misrepresentation" or "fraud", while understandable, is unforgivable.

CONCLUSION

Here, Josephine County - possessed of governmental power, superior financial ability and strong legal representation - looked at the evidence available to Petitioners, assessed its position as to responsibility,

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[16] The Ockendens did submit the Affidavit of Richard Riker during the proceedings instigated by the State motion, but the Magistrate wrongly excluded it in his rush to judgment. *See* footnote 8, *supra*.

considered the matter fully at a duly noticed public hearing where the Ockendens and their lawyer were notably absent, and unanimously decided to stipulate to the truth and accuracy of Petitioners' material allegations, to the existence of Federal civil rights violations, and to the occurrence of resulting damages. No one appealed the resulting Consent Decree.

The State intervened months later to challenge only the injunctive remedy employed because it could and did have no interest in the responsibility features of the claim. Not until the case reached the Ninth Circuit briefing stage did anyone suggest that the responsibility stipulation could be set aside. At that point, even though the State had neither standing nor a significant protectable interest in the stipulation of liability, the Ninth Circuit purported to set aside on the State's motion the Stipulation as to County responsibility for admitted civil rights violations and to strip the Ockendens of the concession upon which they have relied for years.

The simple telling of this bizarre tale demonstrates the need for judicial intervention under Sup. Ct. R. 10(a).

Respectfully Submitted,
Ridgway K. Foley, Jr., P.C.
Greene & Markley, P.C.

By Ridgway K. Foley Jr.
Ridgway K. Foley, Jr., P.C.
Counsel of Record for Petitioner

APPENDIX A

FILED
97 DEC 24 AM 8:33
CLERK, US DISTRICT COURT
DISTRICT OF OREGON
MEDFORD, OREGON
BY *NR*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WARD and JENNIE OCKENDEN	)	
Plaintiffs,	)	Civil No. 97-3008-
v.	)	CO
JOSEPHINE COUNTY, a political subdivision of the State ofOregon,	)	ORDER
Defendant.	)	

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CONSERVATION AND DEVELOPMENT
COMMISSION OF OREGON

COONEY, Magistrate Judge:

On April 4, 1997, the plaintiffs and defendant, having consented to the entry of final judgment by a

Magistrate Judge, submitted a stipulated Final Consent Decree which was signed by the Court on April 7, 1997. On August 28, 1997, the court granted the Land Conservation and Development Commission (LCDC) motion to intervene. Defendant Josephine County and defendant/intervenor LCDC move for relief from the final consent decree pursuant to Federal Rules of Civil Procedure Rule 60(b) (#23 and #38).

FACTS[1]

The Josephine County Comprehensive Plan (the Plan) allows for post acknowledgment plan map amendments based upon soil types on specific property, i.e. change of plan designation from forest resource land to non-resource land. (Snider affidavit at 2). The Plan text assigns a numerical value to identified soil classifications. (Id.). This numerical value is known as the soil's Internal Rate of Return (IRR). (Id.). The Plan text for the IRR process uses the types of soil classified for Josephine County by the U.S. Soil Conservation Service (SCS). (Id.). In order to obtain a plan amendment using the IRR, a plan amendment application must establish that the cumulative internal rate of return

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[1] Defendant/Intervenor LCDC moves to strike the affidavit of Richard W. Riker because it is not based on personal knowledge and it consist largely of opinions on matters of law. The court finds that defendant/intervenor's motion is well taken based on the arguments presented in their closing memorandum, and the court grants the motion to strike.

(CIRR) for all soils on the subject property is below the numerical value of 3.5. (Id.).

On September 8, 1992, plaintiff Ward Ockenden filed an application for a change to the Plan and a zone change for 157.93 acre parcel from Woodlot Resource - 20 acre minimum (WR) to Rural Residential 5 acre minimum (RR-5). (Id.). The matter was initially heard by the Planning Commission on January 11, 1993. (Id.). At the hearing, it was determined that the application incorrectly designated some of the site's soils due to incorrect slope measurement. (Id.). Mr. Ockenden requested and was granted a continuance until May 10, 1993, to provide corrected information. (Id. at 2-3).

On May 10, 1993, the Planning Commission further continued the matter until June 28, 1993. (Id. at 3). The Planning Commission reconvened on June 28, 1993 to consider Mr. Ockenden's application, and tentatively approved the plaintiff's application and directed that finding be prepared by the plaintiff. (Id.). On July 16, 1993, it recommended approval of the application by the Josephine County Board of Commissioners (the Board) and adopted findings. (Id. at 3).

The Board held a hearing on Mr. Ockenden's application on September 1, 1993. (Id.). The Board gave tentative approval to Mr. Ockenden's requested Plan change and his requested zone change subject to adopting findings that Mr. Ockenden would prepare.

(Id.). Mr. Ockenden did not submit findings for four months. (Id.). On January 26, 1994, the Board made a final decision granting Mr. Ockenden's requested plan amendment and zone change and adopting the findings Mr. Ockenden submitted. (Id.). The findings supported an IRR rating below the 3.5 standard by assigning a numerical value of 2.0 for those soils not identified in the Plan. (Id.).

On February 8, 1994, Steve Doob appealed the Board's approval of Mr. Ockenden's application to the Land Use Board of Appeals (LUBA). (Id.). The Department of Land Conservation and Development (DLCD) joined the case as a Plaintiff/Intervenor. (Id.). On May 25, 1994, LUBA remanded the decision finding that the County erred in using soils and IRR numerical values that were not included in the Plan. (Id. at 3-4). The LUBA decision was not appealed. (Id.).

After the 1994 remand from LUBA, Mr. Ockenden, Mr. Snider of the Josephine County Planning Department, and Mr. Ockenden's attorney met to consider how to proceed with the application. (Id. at 4). During the meeting, it was acknowledged that a plan text amendment was needed that would identify the soils on Mr. Ockenden's property with IRR numerical values. (Id.). They agreed to hold the application in abeyance until resolution of the needed Plan text amendments. (Id.). Mr. Ockenden agreed to engage the services of a forester and soils expert to assist in identifying the

subject spoils and provide them with an IRR numerical value that could be incorporated into the Plan's IRR data base. (Id.).

At a hearing held on January 30, 1995, the Josephine County Planning Commission considered Mr. Ockenden's proposal to amend the Plan text to incorporate new soils and respective IRR numerical values for the soils. (Id.). At that hearing, Mr. Ockenden's representative acknowledged that they relied upon incorrect data and requested a continuance. (Id.). Upon receiving further information, the Planning Commission recommended Mr. Ockenden's proposed amendment to the Plan text. (Id. at 4-5).

In March of 1995, the IRR plan amendment process was challenged by a petition for an enforcement order filed pursuant to ORS 197.319. (Id. at 6). The petition asserted that the County could not impose and IRR numerical rating of 2.0 on soils which were not identified in the County's Plan text[2]. (Id.). Given the LUBA decision on the appeal of plaintiff's application, the Josephine County Planning Director responded to the enforcement order petition by agreeing to use only those soils assigned an IRR numerical value in the Plan text when calculating the Cumulative Internal Rate of Return

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[2] The practice of utilizing a 2.00 soil designation for specific agricultural soils not assigned a cubic site class by the U.S. Forest Service was deemed illegal by LUBA in June of 1996. (Snider affidavit at 6).

(CIRR) for individual parcels. (Id.). The County than began the process of considering the CIRR numerical values for the predominant soils for purposes of determining if an application for a plan amendment satisfied the CIRR criteria[3]. (Id.).

At their July 26, 1995 meeting, the Board considered the adoption of the Plan text changes for the plaintiff's proposed new soils and corresponding IRR numerical values. (Id. at 5). At the conclusion of the hearing, the Board voted to approve the text changes, and directed Mr. Ockenden to prepare the necessary findings. (Id.). The board then took up the issue of the LUBA remanded plan amendment and zone change. (Id.) During the hearing, it was pointed out that the property at issue had a different slope than assumed by Mr. Ockenden, which would change the soil classifications and corresponding IRR numerical values. (Id.). Plaintiff's representative acknowledged that given the slope information, the previously considered and approved plan text change did not include all of the soils on Mr. Ockenden's property with an IRR numerical value. (Id.). The Board directed that the matter be brought back to the Board when it reconsidered the Plan text decision made earlier in the meeting. (Id.).

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[3] On June 14, 1996, in the matter of Doob v Josephine County, LUBA No. 95-229, LUBA ruled that the use of predominant soil consideration for determining the CIRR numerical value was not provided for in the County's Plan and could not be used. (Id.).

Mr. Ockenden did not submit findings to support the Plan text changes approved at the July 26, 1995 Board meeting, and he did not request that the matter be reconsidered. (Id.). Mr. Ockenden did not request that the hearing on the LUBA remanded applications for the plan amendment and zone change be brought back to the Board. (Id.).

The Josephine County Rural Land and Development Code (the Code) sets forth the process and authority to grant a quasi-judicial plan amendment and zone change. (Id.). This process requires prior notice to property owners within 1500 feet of the subject property and published notice. (Id.). The Board is required to make the decision to grant the Plan amendment. (Id. at 7). The Code provides that quasi-judicial plan amendments and zone changes are not final until the written findings of fact are prepared, adopted by a majority of the Board, and mailed[4]. (Id.). The Code provides that both plan amendments and zone changes are subject to appeal to LUBA. (Id.).

Plaintiffs filed their complaint on February 10, 1997. Plaintiffs' complaint alleges that prior to July of

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[4] In his second affidavit, Mr. Snider states that in matters of individual land use applications which are approved by the Board, it is the general practice of the County to require the successful applicant to prepare and submit findings in support of the decision of approval. Those findings are then presented to the Board for adoption. (Second Snider affidavit at 2).

1995, plaintiffs applied for a zone change for their property from WR to RR-5, and that Josephine County failed and refused to approve the request for a change in the Comprehensive Land Use Plan and plaintiffs' request for a zone change for their property even though plaintiffs had performed all conditions precedent to the requested action. (Plaintiffs' Complaint at 3). The complaint alleges that plaintiffs reapplied for identical changes in the Comprehensive Land Use Plan and for an identical zone change in July of 1995, plaintiffs provided the Josephine County Board with proof that plaintiffs were entitled to issuance of zoning change and Comprehensive Land Use Plan change, and the Josephine County Board of Commissioners failed and refused to order Josephine County to issue the requested changes for which application was made. (Plaintiffs' complaint at 5).

These factual allegations were incorporated into a stipulation in support of the consent decree. (Stipulation in Support of Consent Decree #6). The stipulation also states that the court has subject matter jurisdiction over the case. (Id.). The consent decree was signed by plaintiffs' attorney on March 22, 1997. (Id.).

The Board, at their April 4, 1997 meeting , directed County Counsel Steven Rich to sign the consent decree on behalf of the County. (Rich affidavit at 1-2). The County did not provide written notice to the director of DLCD, did not provide notice of intent to enter into

the consent decree, and did not reduce the decision to writing or adopt finding in support of the decision. (Id. at 2). The County Commissioners gave notice that they were going to hold a public meeting on April 4, 1997, and one of the items on the agenda was the "Consideration of Stipulation in the matter of Ockenden v. Josephine County US District Court Case #97-3008-CO (civil case)". (Affidavit of Counsel in Opposition to the State of Oregon's Motion to Intervene Exhibit B).

Plaintiff's claim that setting aside the consent decree will cause them great financial losses. (Plaintiffs' Exhibit A). Plaintiff, Ward Ockenden, has executed an unrecorded to the property in question for himself and his wife. (Ockenden affidavit at 2). Mr. Ockenden believed that Mr. Doob would oppose, interfere with or cause impossible expense in connection with any proceeding regarding the property at issue in the complaint. (Id. at 3). Therefore, Mr. Ockenden instructed Mr. Boiler "to hold the details of his representation, other than matters of public record, completely and carefully confidential to avoid disclosure to Mr. Doob if at all possible." (Id.). Mr. Ockenden did not intend or instruct Mr. Boiler to conceal the proceedings from the State of Oregon or the Planning Department. (Id.).

DISCUSSION

Defendant Josephine County moves for relief from the consent decree pursuant to Rule 60(b)(1), (4), (5),

and (6) based on the following arguments:

1) the court should relieve the defendant from the consent decree because it was entered into by reason of mistake;

2) the court should relieve the defendant from the consent decree because the decree was entered without authority and is therefore void;

3) the court should relieve the defendant from the consent decree because enforcement of the consent decree would deny certain interested parties their right under state law to appeal and would impose and inequitable result; and

4) the court should use its inherent authority to set aside the consent decree because of the extraordinary circumstances of the case, and because failure to provide relief from the consent decree would "stymie the state's sovereign authority in matters of land use."

Plaintiffs argue that:

1) the County attorney's ability to define what constitutes a land use decision is insufficient to set aside the consent decree under Rule 60(b)(1);

2) defendant has failed to explain its failure to appeal the consent decree;

3) the effect of the consent decree on the State's interest does not constitute extraordinary circumstances;

4) there have been no changes in the law or in the circumstances between the time when the consent decree was entered and the time the motion was filed;

5) since the court has subject matter jurisdiction over this case, and federal law preempts state law, the consent decree is not void; and

6) vacating the consent decree will result in a grossly inequitable impact on the plaintiffs.

Defendant/Intervenor DLCD moves for relief from the final consent decree pursuant to Rule 60(b)(3), (4), and (6) based on the following arguments:

1) the court should grant relief from the consent decree because the consent decree was obtained based on a misrepresentation to the court;

2) the court should grant relief from the consent decree because the decree was entered without authority, and is therefore void;

3) the court should grant relief from the consent decree because the consent decree threatens the State's important interest in the integrity of the land use process.

Plaintiff's argue that the factual record submitted by defendant/Intervenor has misled the court regarding the following facts: 1) that plaintiffs were untruthful when they alleged that they had performed all the conditions precedent to the requested land use action[5]; 2) that plaintiffs brought this action as a sham and

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[5] It is clear from Mr. Snider's affidavit and the minutes of the July 26 meeting that the text amendment did not include all the soils on the Ockendens' property with IRR numerical values, and that this was necessary in order to consider the remanded plan amendment and zone change. (Snider affidavit at 5).

pretense to circumvent and unfavorable ruling in Doob v. Josephine County, 27 Or. LUBA 293 (1994) and Doob v. Josephine County, 31 Or. LUBA 275 (1996)[6]; 3) that plaintiffs' allegations summarized in the court's order are not supported by the evidence[7]; 4) that plaintiffs, their counsel and County Counsel colluded in secret process to avoid notice to the State of Oregon, and to circumvent that State's valid interest in land use process[8]; 5) that the complaint alleging equal protection violations, and treatment by plaintiffs differently and arbitrarily than those similarly situated was a sham[9]; 6) plaintiffs and

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[6] Mr. Ockenden stated in his affidavit that he wished to avoid the involvement of Mr. Doob and other land use activists in the federal court matter. (Ockenden affidavit at 3).

[7] The court in its order granting the State's motion to intervene found that the allegations contained in plaintiff's complaint and incorporated into the stipulation in support of the consent decree were not supported by the evidence. It is clear from the minutes of the July 26 meeting and Mr. Snider's affidavit that the text amendment did not include all the soils on the Ockendens' property with IRR numerical values which was necessary in order to proceed with the remanded plan amendment and zone change.

[8] As pointed out by defendant/intervenor, the State and affected citizens were deprived of their opportunity to participate in the land use decision to rezone plaintiffs' property through the federal suit and the consent decree.

[9] It appears that plaintiffs' compalint does not address the impact of the March 1995 enforcement order on the County's past practices regarding the 2.00 IRR soils method, and it does not

their land use counsel, and not defendant Josephine County were responsible for taking the next action to process the site-specific Text Amendments[10]; and 7) plaintiffs Ward and Jennie Ockenden were not owners in fee simple absolute of the property[11].

In opposition to defendant/intervenors arguments, plaintiffs make the following argument:

1) the evidence and true facts of the case do not support setting aside the consent decree on the grounds of fraud;

2) the court has subject matter jurisdiction, the consent decree is not void;

3) the State has failed to establish extraordinary circumstances warranting relief from the consent decree; and

4) the interest in the finality of judgments is paramount

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address the June 1996 LUBA opinion which found this practice to be illegal.

[10] As pointed out earlier, this point is irrelevant given the fact that the approved Text Amendment did not include IRR numerical values for all the soils on the Ockenden property. In addition, Mr. Snider has stated that it is the County's practice to require applicants to prepare the findings to support the Board's decision to approve land use applications. (Second Snider affidavit at 2).

[11] Plaintiff Ward Ockenden has stated in his affidavit that he has unrecorded deed which puts the property in his wife's name as well as his own name. However, on his land use application Mr. Ockenden represented that he was the sole owner of the property in question.

in this case.

Federal Rules of Civil Procedure Rule 60(b) provides in part that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake . . .; (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Mistake

To be entitled to relief under Rule 60(b)(1), the movant must demonstrate mistake, inadvertence, surprise, or excusable neglect. "Neither ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)." Engleson v. Burlington Northern R. Co., 972 F.2d 1038, 1042 (9th Cir. 1992)(citations and quotations omitted). In this case, County Counsel's ignorance as to the effect of the Board's decision as a land use decision is not the type of "mistake" contemplated by Rule 60(b)(1). See Horvath v. United States, 404 U.S. 849 (1971). Therefore, the court will not vacate the final consent decree on this basis.

Misrepresentation

To prevail on a motion made pursuant to Rule 60(b)(3)[12], the moving party must: 1) prove by a preponderance of the evidence that a judgment was obtained by fraud, misrepresentations, or misconduct; and 2) prove that the conduct complained of prevented the moving party from fully and fairly presenting his case. Bunch v. U.S., 680 F.2d 1271, 1283 (9th Cir. 1982). A motion made under Rule 60(b)(3) must be brought within a year "after the judgment, order, or proceeding was entered or taken." Fed.R.Civ.P. Rule 60(b); U.S. v. Sparks, 685 F.2d 1128, 1129 (9th Cir. 1982). The court may grant relief under subsection (3) where the material information was withheld or was incorrect. See Matter of Emergency Beacon Corp., 666 F.2d 754, 759 (2nd Cir. 1981); See also Moser v. Bascelli, 879 F.Supp. 489, 493 (E.D.Penn.), affirmed, 70 F.3d 1256 (3rd Cir. 1995).

The defendant/intervenor filed their motion within one year of the entry of judgment.

Plaintiffs' complaint alleges that prior to July of 1995, plaintiffs applied for a zone change for their

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[12] Plaintiffs rely on Luttrell v. United States, 664 F.2d 1274, 1276 (9th Cir. 1980) as authority for the standards for fraud on the court under Rule 60(b)(3). However, this case actually discusses the standard for fraud on the court under the "savings clause" which is Rule 60(b)(6). Luttrell, 664 F.2d at 1276. The standards for Rule 60(b)(3) are different from the standards under Rule 60(b)(6). See First National Bank of Louisville v. Lustig, 832 F.Supp. 1058, 1062 (E.D.Louisiana 1993).

property from WR to RR-5, and that Josephine County failed and refused to approve the request for a change in the Comprehensive Land Use Plan and plaintiffs' request for a zone change for their property even though plaintiffs had performed all conditions precedent to the requested action. (Plaintiffs' Complaint at 3). The complaint alleges that plaintiffs reapplied for identical changes in the Comprehensive Land Use Plan and for an identical zone change in July of 1995, plaintiffs provided the Josephine County Board with proof that plaintiffs were entitled to the issuance of zoning change and Comprehensive Land Use Plan change, and the Josephine County Board of Commissioners failed and refused to order Josephine County to issue the requested changes for which application was made. (Plaintiffs' complaint at 5). These factual allegations were incorporated into a stipulation in support of the consent decree. (Stipulation in Support of Consent Decree #6).

The evidence presented establishes that the Board approved plaintiff Ward Ockenden's applications on January 26, 1994. (Snider Affidavit at 3). Mr. Doob appealed the approvals to LUBA in February of 1994. (Id.). LCDC joined the suit as plaintiff/intervenor. (Id.). LUBA remanded the approvals findings that the County erred in using soils and IRR numerical values that were not included in the Plan (Id. at 3-4).

The evidence presented establishes that at a July 26, 1995 meeting, the Board considered and approved the

adoption of a Plan text change proposed by plaintiff, subject to Mr. Ockenden submitting proposed findings to support the amendment. (Id. at 5). During the same meeting, the Board considered the remanded plan amendment and zone change. (Id.). While considering the remanded applications, Mr. Doob pointed out that the previously approved text change did not include IRR numerical values for all the soils on Mr. Ockenden's property; Mr. Ockenden's property had a different slope than the soils contained in the previously considered text amendment. (Id.). The Board directed that the matter of the remanded applications be brought back up when it reconsidered the Plan text decision made earlier. (Id.). Mr. Ockenden did not request that either matter be reconsidered. (Id.).

Defendant/intervenors have established that certain factual representations made in the complaint and the stipulation to the consent decree are not supported by the evidence. The court finds that the defendant/intervenors have established by a preponderance of the evidence that material information was withheld from the court or was misrepresented in the complaint and stipulation which accompanied the consent decree. Defendant/intervenors have also established that they were prevented from fully and fairly presenting their case and participating in this litigation to protect their interests.

ORDER

Based on the foregoing, it is ordered that

defendant/intervenor DLCD's motion for relief from the final consent decree is granted, and defendant Josephine County's motion for relief from judgment is denied as moot.

DATED this *24* day of December, 1997

John P. Cooney

UNITED STATES MAGISTRATE JUDGE

APPENDIX B

FILED
May 20, 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WARD OCKENDEN; JENNIE OCKENDEN, Plaintiffs-Appellants, v. JOSEPHINE COUNTY, a political subdivision of the State of Oregon, Defendant-Appellee, LAND CONSERVATION AND DEVELOPMENT COMMISSION OREGON, Defendant-intervenor-Appellee.	CA No. 98-35104 DC No. CV-97-03008-JPC MEMORANDUM[1]

Appeal from the United States District Court
for the District of Oregon
John P. Cooney, Magistrate, Presiding

Argued and Submitted May 4, 1999
Portland, Oregon

BEFORE: CANBY and T.G. NELSON, Circuit Judges, and FOGEL,[2] District Judge

Ward and Jennie Ockenden appeal from the district court's order granting the motion of the State of Oregon for relief, pursuant to Fed. R. Civ. Proc. 60(b), from a final consent decree between the Ockendens and Josephine County.[3] We affirm.

We review for abuse of discretion a district court's decision on a Rule 60(b) motion. United States

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[2] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

[3] Prior to ruling on the Rule 60(b) motion, the district court granted the State's motion to intervene in these proceedings, and that ruling has not been appealed.

evidence that the [judgment] was obtained through fraud, misrepresentation, or other misconduct." Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982) (emphasis added).

v. Washington, 98 F.3d 1159, 1163 (9th Cir. 1996). Rule 60(b) states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. Proc. 60(b).

The district court vacated the decree pursuant to Rule 60(b)(3). To prevail on that ground, the movant must, among other things "prove by clear and convincing

Here, the district court granted the motion pursuant to Rule 60(b)(3), but it did so under the incorrect legal standard. Citing to Bunch for authority, the district court required the movants to prove by a "preponderance of the evidence that a judgment was obtained by fraud, misrepresentations, or misconduct." (Emphasis added). The Ockendens argue that the employment of this standard was clear error requiring reversal. We conclude, however, that the error does not necessitate reversal.

The standard for harmless error in a civil case is less stringent than that in a criminal case. Mockler v. Multnomah County, 140 F.3d 808, 813 (9th Cir. 1998)

(concluding that jury instruction improperly shifting burden of proof was harmless error). An erroneous burden of proof does not necessitate reversal when the prevailing party met the correct standard and the result would have been the same if the proper burden had been employed. See id. at 812-14. Here, the conditions of harmless error were all met.

The facts relied on by the district court were matters of public record. Included among them were the facts that the County had approved Ockenden's requests, that a third party and the State, through its Department of Land Conservation and Development, had appealed that approval to the Land Use Board of Appeals, and that the Land Use Board of Appeal had overturned the action of the County. The parties here do not dispute these crucial facts upon which the district court's order was based. After reviewing the sequence of events in this case and the allegations in Ockenden's original complaint and stipulation, the district court concluded that the above information was "withheld from the court or was misrepresented in the complaint and the stipulation which accompanied the consent decree."

The evidence in support of this finding was clear and convincing. The complaint and stipulation stated that the Ockendens had complied with all necessary requirements and were entitled to the zoning and plan changes, but that the County refused to make them. In actuality, the County had approved the changes, but the

Land Use Board of Appeals had held the modifications illegal in the absence of certain public procedures and other steps required for amendment of the county's comprehensive plan. The necessary procedures and steps were never completed. The district court thus entered the consent decree, which required the County to grant the changes, under a misapprehension induced by fraud, to the detriment of the State intervenor, whose victory before the Land Use Board of Appeals was effectively annulled.

In light of these clearly established facts, the district court did not abuse its discretion in granting the State relief from the consent decree pursuant to Rule 60(b)(3).

AFFIRMED.

APPENDIX C

U.S.C. 28 § 1292(a) - Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed.

APPENDIX D

Federal Rule of Civil Procedure 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or

to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WARD OCKENDEN, Plaintiff, v. JOSEPHINE COUNTY, OREGON, a political subdivision of the State of Oregon, Defendant, STATE OF OREGON, by and through the DEPARTMENT OFLAND CONSERVATION AND DEVELOPMENT, and RICHARD P. BENNER, Director, Defendants-Intervenors.	) Civil Case No. 97-3008-CO) AMENDED COMPLAINT) (Suit in Equity for Injunctive Relief and Action for Damages for Civil Rights Violations Pursuant to 42 U.S.C. § 1983, U.S. Const. Equal Protection Clause and Am. 14; Pendent State Action at Law for Breach of Contract)) (Jury Trial Demanded)

Plaintiff alleges:

I.

NATURE OF THE CASE

At all times material herein, Plaintiff Ward Ockenden was and is the holder of the last deed of record evidencing ownership in fee simple absolute to certain real property located in Josephine County, State of Oregon, all within the District of Oregon, and comprised of approximately 157 acres of land zoned for Woodlot Resource. At all times material herein, Defendant Josephine County was and is a political subdivision of the State of Oregon located entirely within the District of Oregon, acting, purporting to act or failing to act, as applicable, so as to implement or execute a policy, practice, custom or usage of Josephine County and the State of Oregon, and so acted or failed to act under color of state law.

Prior to July, 1995, Plaintiff applied to Defendant Josephine County for approval of a Comprehensive Land Use Plan change and a zone change for his rural real property located in Josephine County, currently zoned as Woodlot Resource. The applications made by Plaintiff, taken as a whole, proposed a minor alteration to Defendant Josephine County's Comprehensive Land Use Plan, by adding certain soil types existing on Plaintiff's land as recognized soil types with recognized values for Comprehensive Land Use Plan purposes, where such soil types had not been recognized or identified previously in

Defendant's Comprehensive Land Use Plan.

The applications made by Plaintiff, further taken as a whole, proposed a zoning designation for Plaintiff's property from Woodlot Resource to Rural Residential 5-Acre Permissive Use.

These applications, taken as a whole, were designed to conform to state-law based on land use goals and policies, and to demonstrate to Defendant Josephine County, having the sole specific jurisdiction over Plaintiff's proposed changes by amendment County Ordinances, to demonstrate that Plaintiff's land was properly classifiable, in its highest and best use, as "non-resource" land, within the meaning of State Land Use Goal 11, Policy 5. In assessing Plaintiff's applications, which were made, ruled upon, appealed and re-submitted over a period of several years, Defendant County chose to evaluate Plaintiff's requests by assigning numeric values to the various soils identified on Plaintiff's property. Defendant County's chosen method to do this, applied to all or substantially all of those similarly situated to Plaintiff in the years immediately preceding the acts and omissions of Defendant County complained of herein, was to compute soil value by assigning soils an "Internal Rate of Return" (hereafter IRR) for certain soils located on the property subject to the application for rezoning. In ruling upon similar applications for other applicants similarly situated in the five-year period between 1991 and the present, Defendant Josephine

County had consistently utilized a method of calculating the IRR of soils in non-forest land such as that owned by Plaintiff for which the application was made. This method had been previously applied by Defendant County, to all or substantially all others similarly situated at the time Plaintiff's application, in such a way as to dictate a result of approval of applications, for all or substantially all others similarly situated to Plaintiff, during the years immediately preceding and immediately after Plaintiff's application to Defendant Josephine County described above.

Plaintiff applied for the requested Comprehensive Plan change and zone change outlined above and sought, among other things, for Defendant County to compute the Internal Rate of Return for soils located on the parcel owned by Plaintiff subject to the request for zoning change, utilizing the same methods and criteria as applied to those similarly situated, in the past, either by past policy, practice, custom or usage of Defendant Josephine County.

Defendant Josephine County approved Plaintiff's requests initially, but those approvals were then appealed by a person not party to this action, or to the application process until his appeal, one Steven Doob, on grounds which resulted in a ruling by a quasi-judicial body created under the State of Oregon's land use statutes, the Land Use Board of Appeals, which remanded the previous approvals to the County for certain specific

action on remand.

Pursuant to this remand, Plaintiff renewed his application and presented evidence at a duly noticed meeting before the Defendant's Board of Josephine County Commissioners, having jurisdiction over approval of Plaintiff's previous requests and current requests. Defendant's Board was empowered to grant Plaintiff's requests, provided the issues identified for addressing by LUBA on remand had been addressed. At that time and place, Plaintiff presented all the evidence and legal authority necessary to satisfy the conditions set by the LUBA remand referred to above, and Defendant County's authorized representative, Michael Snider, acknowledged on the record at that time that the issues for LUBA remand had been satisfied by the Plaintiff.

Thereafter and at the same time and place, the Defendant County's Board of Commissioners voted unanimously to approve an amendment to Defendant County's Comprehensive Land Use Plan, which amendment was the last condition precedent necessary for Plaintiff to satisfy, in order to be entitled to the site-specific zoning ordinance changes and Comprehensive Land Use Plan changes necessary to finalize Plaintiff's applications, and to convert Plaintiff's permissive uses of his land from Woodlot Resource to Rural Residential Five-Acre Use.

Notwithstanding this fact, notwithstanding that Defendant's own record reflects that the issues for LUBA

remand were then and there satisfied by Plaintiff in July, 1995, and that Defendant's past policy, practice, custom or usage had been and would be to then and there undertake to vote for and approve all actions necessary by Defendant County to accomplish that which Plaintiff sought by his applications, taken as a whole, Defendant County failed and refused to continue the meeting so that the necessary vote could be taken.

At that time and place, Defendant County also specifically undertook to notice a second and separate public meeting for the purpose of considering new objections by the former intervenor initiating LUBA proceeding against the approved applications of Plaintiff referred to above, Steven Doob. Mr. Doob filed no appeal of the land use decision taken by Defendant County in favor of Plaintiff in July, 1995, nor did any other person. Thereafter, Defendant County failed and refused to record or memorialize their unanimous vote amending the Comprehensive Land Use Plan, which was itself a land use decision and the last condition precedent to permitting the requested action by Plaintiff, and failed and refused to otherwise complete the process of approval of Plaintiff's requested land use actions, even though Plaintiff had performed all conditions precedent to the requested action, even though Defendant County had done so uniformly with those similarly situated previously, and even though Plaintiff was entitled to the granting of the requested land use action summarized

above by operation of law and by virtue of the policy, practice, custom or usage of Defendant County in the past, with those similarly situated, particularly dealing with the central question of valuation of forest and agricultural soils.

This failure and refusal, although all or substantially all requirements necessary for approval of the requested actions made by Plaintiff summarized above had been satisfied, was arbitrary and irrational, contrary to the established policy, practice, custom or usage of Defendant Josephine County and the State of Oregon, and has thereby caused deprivation of rights secured to Plaintiff by virtue of the U.S. Constitution, Amendment Fourteen, and the Equal Protection Clause of the U.S. Constitution.

Defendant County failed and refused to take the action necessary to further process and approve Plaintiff's applications by tabling consideration thereof and failing or refusing to notice a further meeting of the Board of Defendant County, even though it had undertaken to do so. Over the ensuing year between July, 1995 and June, 1996, this failure and refusal continued, and it became evident thereby that any attempt by Plaintiff to further seek approvals of the requested action by Defendant County would be futile. As a result, Plaintiff retained legal counsel herein, and associated with counsel a 20-year employee of Defendant County's Planning Department, retired in 1995, who,

having co-drafted the agricultural and soils mapping utilized by Defendant County's Planning Department in its evaluation of land use action requests, was uniquely qualified to evaluate the evidence presented by Plaintiff to date, and to provide an expert opinion as to whether all conditions precedent necessary to approve Plaintiff's requested land use actions had been satisfied by Plaintiff, to provide expert opinion as to whether further actions by Plaintiff to seek approvals would be futile; and whether in comparison to those similarly situated to Plaintiff, and whose land use action requests were of record with Defendant Josephine County, Plaintiff had been treated differently and in an arbitrary manner.

Approximately six months prior to the initial filing of Plaintiff's Complaint herein in February, 1997, and based on the expert evaluation by said expert and evidence provided pursuant to that evaluation to counsel for Plaintiff, counsel for Plaintiff on Plaintiff's behalf tendered on or about August 29, 1996, a draft Complaint in the form ultimately filed in February, 1997, to legal counsel for Defendant County. Simultaneously were tendered legal authorities, an analysis of the law and facts summarized above as applied to U.S. Constitutional cases arising in the land use context in the Ninth Circuit. Negotiations between counsel for Defendant County and counsel for Plaintiff began thereafter and continued for more than five months.

During negotiations, Defendant County expressly

agreed, by unanimous vote of their governing Board of Commissioners, that the acts and omissions of Defendant as set forth with particularity above constituted an arbitrary deprivation by Defendant of rights secured to Plaintiff by virtue of the U.S. Constitution, Amendment Fourteen, and by the U.S. Constitution, Equal Protection Clause. After duly noticed public meeting on April 4, 1997, Defendant's governing body expressly authorized by unanimous vote Defendant County's legal counsel to execute a written Stipulation to this effect, further memorializing an agreement between Defendant County and Plaintiff that:

1. Plaintiff would waive all right to seek damages through the date of Final Consent Decree for the Constitutional violations admitted;

2. Plaintiff would, through the date of Final Consent Decree, forego all right to seek reasonable attorney's fees and costs incurred in obtaining the Final Consent Decree as a final adjudication of this matter; and

3. Plaintiff and Defendant would consent to the express terms of the form of Final Consent Decree signed by this Court on April 7, 1997. The form of Final Consent Decree was expressly tendered to the governing body prior to the time for the public meeting and Stipulation consideration referred to above, and its terms and conditions were fully known and incorporated by reference in the written Stipulation of record in this matter, authorized by Defendant County.

More than 30 days after the entry of this Court's Final Consent Decree in accordance with the agreement of the parties referred to above and of record herein, Michael Snider and Bruce Bartow, authorized representatives of Defendant County's Planning Department, refused to obey the Final Consent Decree by its terms, stating that the authorized actions of Defendant County's duly elected body conflicted with existing state law, and with the abstract interest of the State of Oregon in the land use process generally, even though no such objection was raised or discussed, directly or indirectly, at any time prior to entry of the Final Consent Decree herein. Thereafter, on information and belief, Defendant's authorized representatives contacted representatives of the Department of Land Conservation and Development, Defendants-Intervenors herein. On information and belief, representatives of Defendants-Intervenors herein thereafter induced Defendant County's then legal counsel to recommend repudiation of the agreement, Stipulation and Final Consent Decree considered and approved unanimously by noticed public meeting in April, 1997.

Thereafter, Defendant County sought to vacate the Final Consent Decree to which it had consented, alleging grounds for relief from the judgment existed by virtue of mistake, inequity, voidness and other grounds under Fed R Civ P 60, but denied that grounds existed for vacation based on "fraud on the Court".

Defendants-Intervenors thereafter sought to intervene, were allowed to do so, and moved to vacate the Final Consent Decree upon similar grounds and upon grounds of "fraud of the Court".

By its specific acts and omissions referred to above, Defendant Josephine County induced Plaintiff to waive claims for damages expressly known and exchanged between the parties during pre-filing negotiations, in an amount to be determined at trial, but in an amount comprising damage between $334,500 and $799,500, plus reasonable attorney's fees and costs incurred in this and related proceedings. Defendant County breached its agreements with Plaintiff specified above, despite Plaintiff's performance of all conditions precedent necessary to require performance of Defendant County, and the damages incurred by Plaintiff as summarized generally above were the direct and proximate result of Defendant County's breach.

As a further result of Defendant County's repudiation of its own Stipulation and Final Consent Decree, Plaintiff and his counsel have been forced to defend voluminous motions, to engage in motion and appellate practice and defense, and will continue to do so, all to Plaintiff's additional damage.

The agreement between Plaintiff and Defendant County breached by Defendant County arose out of the same core of operative fact as the acts and omissions of Defendant giving rise to the claim of federal question

jurisdiction referred to herein.

In the alternative to all claims of damage summarized herein, Plaintiff claims to have no plain, speedy or adequate remedy at law.

II.

JURISDICTION

Jurisdiction over Plaintiff's First and Second Claims for Relief pursuant to 42 U.S.C. § 1983 arises pursuant to 28 U.S.C. §1343. Plaintiff seeks his reasonable attorney's fees and costs upon this action, to the extent such reasonable attorney's fees and costs arise after April 7, 1997, pursuant to 42 U.S.C. §1988, and the equitable powers of this Court. Plaintiff claims pendent jurisdiction over the state-law based Third Claim for Relief arising in contract.

III.

VENUE

At all times material herein, Plaintiff was and is a resident of and domiciled in the District of Oregon. All acts and omissions complained of herein took place within the District of Oregon, and Defendant Josephine County is located entirely within the District of Oregon.

FIRST CLAIM FOR RELIEF

(42 U.S.C. §1983: Injunctive Relief)

At all times material herein, Plaintiff was and is owner of the last recorded deed of record, and owner of certain real property located entirely within Josephine County, Oregon, consisting of 157.93 acres of land, more

or less, a legal description of which is attached hereto as Exhibit "A" and fully incorporated by this reference, and was thereby vested with all property rights attendant to his ownership interest in said real property, by operation of state statute and common law.

V.

All acts and omissions complained of herein occurred in the District of Oregon, or originated in and were consummated in the District of Oregon.

VI.

At all times material herein, Defendant Josephine County, Oregon, was and is a political subdivision of the State of Oregon, and was and is at all times material herein acting under the color or pretense of law.

VII.

At all times material herein, Defendant Josephine County was acting, unless otherwise specifically alleged herein, under the color and pretense of the laws, regulations, policies, practices, customs or usages of the State of Oregon and of Josephine County, Oregon.

VIII.

Beginning on or about September 8, 1992, Plaintiff began the process of requesting a change in the Comprehensive Land Use Plan of Defendant Josephine County from exclusive Forest to Residential Use, and further requested of Defendant Josephine County a zone change from Woodlot Resource to Rural Residential, five-acre minimum, which applications were nominally

accepted, but effectively and ultimately denied by inaction. Plaintiff reapplied for essentially identical changes in the Comprehensive Land Use Plan and for essentially identical zoning changes in July, 1995, following LUBA remand as alleged in paragraph I.

Although Plaintiff at that time and place provided the Board of Commissioners of Defendant County, proof that Plaintiff had adequately addressed all the issues raised by LUBA remand, and that Plaintiff was entitled to the issuances of zoning change and Comprehensive Land Use Plan change outlined above, Defendant County's Board of Commissioners failed and refused to issue the requested changes for which application was made. Plaintiff had satisfied all conditions precedent necessary to require Defendant Josephine County to so act.

IX.

By failing and refusing to take the requested action of Plaintiff outlined above, Defendant's Board of Commissioners ignored clearly established law. Defendant's decision neither applied to the general community nor involved the promulgation of legislative policy, but rather was directed specifically and solely at Plaintiff. Defendant's refusal further departed from the past and established policy, practice, custom and usage of Defendant establishing criteria for the granting of requests such as Plaintiffs in all or substantially all previous similar cases, and arbitrarily, irrationally or

capriciously applied a different policy, practice, custom or usage to Plaintiff than had been previously applied in all or substantially all cases similarly situated, and for all applications similar in character, at all times material to the Defendant County's executive action.

X.

The acts and omissions of Defendant Josephine County set forth above and directly and proximately caused continuing and irreparable harm to Plaintiff, and will continue to do so, by barring Plaintiff from obtaining building permits and developing his real property described above in accordance with his vested property rights attendant to holding title in fee simple absolute to the involved real property.

XI.

The acts and omissions of Defendant Josephine County as set forth with particularity above did deprive Plaintiff of rights secured to him by the Constitution of the United States, without due process of law, in that Defendant has arbitrarily, irrationally or capriciously deprived Plaintiff of rights in and to real property, including without limitation rights to the requested Comprehensive Land Use Plan change and zoning change outlined with particularity above, without substantive due process, and without affording Plaintiff equal protection of the laws as provided in the U.S. Constitution.

XII.

Plaintiff has no plain, speedy or adequate remedy

at law.

XIII.

By virtue of the foregoing facts, Plaintiff is entitled to a permanent decree in equity compelling Defendant County to:

1. Grant Plaintiff's real property a zone change from Woodlot Resource to Rural Residential, five-acre minimum;

2. Grant Plaintiff's request for both a general and a site-specific change in the Comprehensive Land Use Plan of Defendant Josephine County, to the extent required to allow further development of Plaintiff's real property, as residential property;

3. Require Defendant Josephine County's representatives and agents, and all applicable departments and subdivisions, to utilize an equitable method for establishing the value of soils in, on or under Plaintiff's property, to be applied equally to all citizens, creating a result designed to do equity to Plaintiff and redress the Constitutional deprivations referred to above, in accordance with policy, practice, custom and usage of Defendant Josephine County regarding such methods, utilized with those similarly situated to Plaintiffs between 1990 and July, 1995; and

4. Direct Defendant Josephine County to duly execute, acknowledge and deliver to Plaintiff such other documents as may be necessary to accomplish completed action for each of injunctions 1 through 3 set forth

immediately above in this paragraph.

XIV.

As a direct and proximate result of Defendant's deprivation of rights secured to Plaintiff by the Fourteenth Amendment and the Equal Protection Clause of the U.S. Constitution outlined with particularity above, and made actionable under 42 U.S.C. §1983, Plaintiff has been required to retain the services of an attorney. As prevailing party in this case and controversy, Plaintiff is therefore entitled to recover of Defendant Josephine County his reasonable attorney's fees and costs incurred herein, to the extent incurred after April 7, 1997, both at trial and on appeal, by operation of 42 U.S.C. §1998.

IN THE ALTERNATIVE, PLAINTIFF ALLEGES:

SECOND CLAIM FOR RELIEF

(42 U.S.C. §1983: Damages)

XV.

Plaintiff realleges and incorporates by reference all allegations of facts set forth in paragraphs I through XI, and XIII through XIV of Plaintiff's First Claim for Relief.

XVI.

By virtue of the foregoing facts, Plaintiff in the past has suffered damages as summarized in part in Exhibit "B", attached hereto and fully incorporated by this reference. Such damages were directly and proximately caused by the acts and omissions of Defendant County as summarized above, are continuing,

permanent and increasing, and should be allowed in such additional amounts as to be determined at the time of trial, in the minimum sum of $334,500 to $799,500.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

XVII.

Plaintiff realleges paragraphs I through XI and XIII through XIV of Plaintiff's First Claim for Relief, and paragraphs XV through XVI of Plaintiff's Second Claim for Relief.

XVIII.

Although Plaintiff has performed all conditions precedent giving rise to Defendant Josephine County's duty to fully perform the agreements set forth with particularity in paragraph I and elsewhere above, Defendant Josephine County has failed and refused to abide by its agreement with Plaintiff, has failed and refused to mitigate Plaintiff's damages as a result of Defendant County's breach of its agreements, and has further exacerbated such damages by allowing or directing its ministerial level employees to contravene the express will of the elected and authorized representatives of Defendant County, by moving to vacate its own agreements on grounds improvident at law and unwarranted by a good-faith argument for the extension or modification of existing law, and by assisting, causing or encouraging others, including Defendant-Intervenor State of Oregon, to compound the attorney fees and costs

incurred by Plaintiff, in the hope of furthering its breach of agreement, and escaping legal liability for payment due Plaintiff for breach.

XIX.

As a direct and proximate result of the breaches of agreement between Defendant County and Plaintiff referred to above, Plaintiff has sustained economic damage as summarized in Exhibit "B", attached hereto and fully incorporated by this reference, in the minimum sums of $334,500 to $799,500 for the causes specified therein, and in an amount which is continuing, permanent and to be determined at the time of trial; and has further incurred economic damage in the form of reasonable attorney fees and costs required for defense of third-party proceedings initiated against Plaintiff by Defendant-Intervenor State of Oregon, which Defendant County knew, or in the exercise of reasonable care should have known at the time of entering into its agreements with Plaintiff specified above, would exist and were unknown to Plaintiff, in the minimum amount of $25,000, and in an actual amount to be determined at the time of trial.

WHEREFORE, Plaintiff prays for the following relief against Defendant Josephine County and in favor of Plaintiff:

1. On Plaintiff's First Claim for Relief, for a final decree in equity in favor of Plaintiff and against Defendant Josephine County as set forth with particularity in paragraph XIII above, and for Plaintiff's

reasonable attorney's fees and costs incurred herein after April 7, 1997;

2. On Plaintiff's Second Claim for Relief, for judgment in favor of Plaintiff and against Defendant Josephine County in the minimum sum of $334,500 to $799,500, and in an amount to be determined with particularity at the time of trial, together with Plaintiff's reasonable attorney's fees and costs incurred herein after April 7, 1997;

3. On Plaintiff's Third Claim for Relief, for judgment in favor of Plaintiff and against Defendant Josephine County, for damages in the amounts and for the purposes set forth with particularity in said Third Claim for Relief, together with Plaintiff's reasonable attorney's fees and costs incurred herein after April 7, 1997; and

4. For such other relief as the Court deems equitable.

DATED this 20th day of January, 1998.

Boiler & Kelly

By *Jeff Boiler*
Jeffrey H. Boiler OSB #83021
Of Attorneys for Plaintiff
Trial Attorney

The North Half of the Northeast Quarter; the Southeast Quarter of the Northeast Quarter; the Northeast Quarter of the Northwest Quarter of Section 8, Township 35 South, Range 6 West, of the Willamette Meridian, Josephine County, Oregon.

EXHIBIT "A"

SUMMARY OF DAMAGES ATTRIBUTABLE TO 42 U.S.C. §1983 VIOLATION CLAIMED

DESCRIPTION	DAMAGE AMOUNT
Reasonable attorney's fees and costs incurred in appeal of adverse land use decision in violation of 14th Amendment substantive due process rights:	$23,000
Retention of soil scientists, land use planning consultants, for presentation of evidence in application and appeal; subsequent evaluation of project land use planner of comparable applications times twelve from County Land Use records:	$11,500
Diminution in value from lost ability to subdivide and develop in accordance with established policy, practice, customer usage, in violation of 14th Amendment, U.S. Constitution (owner estimate without formal appraisal, admissible as evidence of value under applicable law):	
160 acres zoned EFU fair market value:	Net $150,000 to 200,000

160 acres zoned RR-5, raw equals $15,000 per five-acre lot times 30 lots, equals $450,000 (sold undeveloped): Net $450,000

or

30 five-acre lots zoned RR-5 plus development cost of $500,000 yields sale price of $1.35 million: Net $835,000

Depending on how the improperly withheld zoning and comprehensive land use change land is developed, the damage is differential demonstrated by these figures equals between: $300,000 and $765,000

These development costs are based on expert testimony retained from the Grants Pass realtor and development communities. $23,000

+11,000

+[$300,000 to $765,000]

TOTAL DAMAGES WAIVED: $334,500 to $799,500*

*This is exclusive of reasonable attorney fees and costs recoverable in the action itself, pursuant to 42 U.S.C. §1988.

SUMMARY OF DAMAGES **EXHIBIT "B"**